IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

CASE NO. 1523/2013

In the matter between:

KENSAL RISE INVESTMENTS (PTY) LIMITED Plaintiff

and

MARCUS WILLIAM MARCHANT Defendant

JUDGMENT

OLSEN J

[1] The principal claim in this matter is one by the plaintiff, Kensal Rise Investments (Pty) Limited, for payment of a sum of Aus $850,000. The plaintiff makes the claim against the defendant, Mr Marcus William Marchant, who was at all material times a director of the plaintiff, upon the basis that the defendant breached a fiduciary duty he owed to the plaintiff in connection with a contract for the sale to the plaintiff by the defendant of his equity interest in four companies and a close corporation, together with some of his loan claims against two of the companies. The plaintiff claims repayment of the price paid alleging that the contract is voidable at its instance by reason of the defendant's breach of his fiduciary duties.

[2] The dispute centres around the thirty three ordinary shares representing a one third minority interest in Morgan Creek Properties 307 (Pty) Ltd ("Morgan Creek") which were bought and sold in terms of the agreement. These shares accounted for a little over half of the total purchase price. It appears that they represented the only fully active business interest amongst the five corporate

entities involved. The corporate entities were loosely associated at shareholder level, and the interest bought in each was a minority interest.

[3] At the time of the agreement the directors of Morgan Creek were Mr Mark Johnson, Mr James Johnson, the defendant and a Mr Richard Mohring. The first three of these were the shareholders. Each of the directors was an active participant in the business of the company. The business of the company was property development. The development which was current at the material time was a housing development known as "Shortens Country Estate" ("Shortens"). Mark Johnson is a civil engineer, and he specialised in the construction side of the business, including pricing, costing and so on. His brother James Johnson is an accountant, who appears to have acted as the chief finance officer of the company. Richard Mohring supervised construction. The defendant himself was, according to Mark Johnson, good at putting together "the body corporate side of things". He chaired most of the body corporates created in the company's developments and took responsibility for landscaping. He also helped in some respects with construction. The defendant describes himself as an estate agent. Morgan Creek has been in business since about 2000 or 2001 when it was acquired as a shelf company.

[4] There are two other persons who feature in the accounts of the facts upon which this case must be decided, and who were not called to give evidence.

[5] The first of these is Mr Richard Peall. Mr Peall is a Zimbabwean who is resident in that country. In August last year the registrar of this court received a letter from the plaintiff's attorney asking that this matter should receive some preference on the rolls because Mr Peall suffers from motor neuron disease; his condition was deteriorating daily with the result that he might not be able to talk or to appear in court for much longer. (As I understand it the trial was brought forward to accommodate this problem.) A Mr Glynn Hawkes, who works for

the Peall Family Trust and is currently a director of the plaintiff, gave evidence and advised the court that Mr Peall was unable to attend because he can no longer speak, and can only communicate at a rudimentary level using a chalk board. Mr Peall is a wealthy man. He is the moving force behind the Peall Family Trust which through its own corporate structures is the ultimate beneficiary of the shares in the plaintiff. Mr Peall or his family trust is in effect also the ultimate beneficiary of the shares in Bay Area Investments Limited ("Bay Area"), a company which appears to be registered in Mauritius, from where its business was conducted at the material time. Bay Area lent the money to the plaintiff to buy the shares and loan accounts which are in issue in this case.

[6] The other central player whose absence from the trial was notable is a Mr Charles Salem. According to Mr Hawkes, Mr Salem and the company of which he is a director, Lion International, were responsible for taking care of the Peall interests in Mauritius. It appears that some or all of the finances necessary for Mr Peall's investments outside of Zimbabwe are channelled through Mauritius. Mr Hawkes said that legal proceedings are underway in Mauritius, in which a claim of some USD 1.3 million has been made by the Peall Family Trust against Lion International, and that criminal charges have been filed by the Peall Family Trust in Mauritius against all the directors of Lion International. The general tenor of the defendant's evidence as to Mr Salem is different; it is to the effect that the defendant regarded, and apparently continues to regard, Mr Salem as a man of reasonable integrity. No evidence was lead as to the availability of Mr Salem to give evidence. It seems that he is not a resident of South Africa.

[7] The pleadings may be summarised as follows, and it is convenient when furnishing the summary to add comments on how some of the issues were treated during the trial.

(a) The plaintiff pleaded that the agreement in terms of which the shares, member's interest and loan claims were bought by the plaintiff had annexed to it marked "C" a document which purports to be a consolidated balance sheet for each of the companies and the close corporation purchased in terms of that agreement. It was referred to throughout the trial as annexure C, and I propose to continue to refer to the document by that name as the parties were unable to agree on how properly to describe it. The defendant denies that it is a consolidated balance sheet.

(b) According to the plaintiff annexure C was prepared by the defendant and presented to the plaintiff so that the plaintiff could evaluate the financial position of the entities dealt with in the document. The defendant denied that he prepared the document and pleads that it was prepared by Mr James Johnson in his capacity as financial director, and that it was accepted (presumably by the plaintiff) "after the conduct of a financial investigation". It became common cause in the course of the trial that the defendant was correct in pleading that annexure C had been prepared by Mr James Johnson. But it became equally clear during the course of the trial that the document had been presented to the plaintiff by the defendant ostensibly (at least) to enable the plaintiff to evaluate the financial position of the entities listed in it, certainly as at 31 August 2010, being the date to which the document purports to speak.

(c) The plaintiff pleaded that annexure C reflects the net asset value of the companies as at 31 August 2010 as some R14,9 million, a gross overstatement in the light of the fact that the financial statements for the year ending 28 February 2010 reflect that the combined overall net asset value of the entities was only some R600,000. The defendant put in issue the proposition that annexure C contained such a gross overstatement.

On the pleadings the defendant also put in issue the accuracy of the financial statements, but offered no challenge to the documents when he gave evidence.

(d) Whereas annexure C reflected a net asset value of some R12,6 million attributable to Morgan Creek, the financial statements referred to earlier reflected that in fact the company had a net accumulated loss of some R3 million. The defendant put the plaintiff to the proof of these allegations and pleaded further that the annual financial statements relied upon by the plaintiff did not reflect the commercial value at the relevant time of the various property developments. Up to a point this latter allegation by the defendant became common cause during the course of the trial.

(e) The plaintiff pleaded that by virtue of his appointment as a director the defendant owed the plaintiff a fiduciary duty. The defendant admitted that allegation.

f) Expanding on this, the plaintiff pleaded that the defendant owed it a fiduciary duty not to work against the plaintiff's interests, not to allow his personal interests to conflict with those of the plaintiff, not to advance his own interests by making a profit at the plaintiff's expense, and to ensure that the financial information reflected in annexure C provided an accurate reflection of the financial positions of each of the companies and the close corporation. The defendant admitted these allegations only to the extent of their consistency with a proper interpretation of the provisions of s76 of the Companies Act, 2008. That left the defendant's case on these issues somewhat obscure, especially considering the admission mentioned in (e) above.

g) The plaintiff pleaded that the defendant's act of producing and attaching annexure C to the agreement constituted a breach of his fiduciary duty owed to the plaintiff, and a breach of ss76 (2)(a)(i) and (ii) of the Companies Act, 2008 entitling the plaintiff to avoid the agreement. These allegations were denied by the defendant.

h) The defendant went on in his plea to allege that annexure C was accepted by the plaintiff after the conduct of a financial investigation by Mr Charles Salem, who signed the agreement on behalf of Bay Area, which was the sole shareholder and financier of the plaintiff, and who also acted on behalf of Mr Peall. (All the agreement reveals is that Mr Salem signed the document on behalf of the plaintiff. Mr Salem was at the time a director of the plaintiff.)

i) The plaintiff pleaded an alternative claim based essentially on fraud, but made no attempt to prove all the requisites for success in that claim.

j) In the particulars of claim the plaintiff tendered return of the share certificates and member's interest bought in terms of the agreement. The defendant responded by noting the tender, and added that it was ineffectual because it did not include the loan accounts which had been purchased. At trial plaintiff's counsel confirmed on behalf of the plaintiff that it tendered return of the loan accounts as well. No issue was raised by the defendant in the pleadings as to whether restitution by the plaintiff was possible and that issue was accordingly not canvassed in evidence.

k) The particulars of claim contained a further claim, being one for an overpayment inadvertently made by the plaintiff to the defendant. At the end of the trial it was common cause that there was an overpayment (i.e. a payment in excess of the sum of Aus $850,000) in an amount of Aus

$10 964,59. The defendant conceded that judgment would have to entered for the plaintiff for this amount but that costs only on the magistrates' court scale should be allowed as the claim was for less than R300 000.

l) Finally, the defendant made a counterclaim for an order directing the plaintiff to secure the defendant's release from all suretyships for liabilities of the companies and close corporation, as the plaintiff had not yet done so. The agreement required the plaintiff to secure these releases. The plea to the counterclaim amounted to a statement that the obligation is recognised if the court should hold that the plaintiff cannot avoid the contract.

[8] The legal principles upon which the plaintiff relies are those set out in *Robinson v Randfontein Estates Gold Mining Company Ltd* 1921 AD 168, and in particular the passage which appears at pages 177 to 178.

> "Where one man stands to another in a position of confidence involving a duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty. The principle underlies an extensive field of legal relationships. A guardian to his ward, a solicitor to his client, an agent to his principal, afford examples of persons occupying such a position. As was pointed out in *The Aberdeen Railway Company v Blaikie* Bros (1 Macqueen 474), the doctrine is to be found in the civil law (*Digest* 18.1.34.7), and must of necessity form part of every civilised system of jurisprudence. It prevents an agent from properly entering into any transaction which would cause his interests and his duty to clash. If employed to buy, he cannot sell his own property; if employed to sell, he cannot buy his own property; nor can he make any profit from his agency save the agreed remuneration; all such profit belongs not to him, but to his principal. There is only one way by which such transactions can be validated, and that is by the free consent of the principal following upon a full disclosure by the agent. In such a case the special relationship *quoad* that transaction falls away and the parties deal at arms length with one another. The general doctrine

> is clear enough; but the remedies available to a principal who discovers that he has purchased his agent's own property depend upon considerations of some nicety. Obviously he is not bound by the contract unless he chooses; he my elect therefore either to repudiate it or confirm it."

[9] In *Phillips v Fieldstone Africa (Pty) Ltd and Another* 2004 (3) SA 465 (SCA) the court summarised the present state of the law in this field, finding the current situation consistent with the doctrine enunciated in *Robinson*, and endorsing its continued application. The principles (accompanied by an extensive set of references) are set out in paragraph [31] of the judgment. Those material to this case may be listed it as follows.

a) The rule is a strict one which allows little room for exceptions.

b) The duty extends not only to actual conflicts but also to those which are a real sensible possibility.

c) The defences open to a fiduciary who breaches his trust are very limited: only the free consent of the principal after full disclosure will suffice.

[10] As mentioned earlier when giving an account of the pleadings, the defendant's response to the plaintiff's list of the elements of the fiduciary duty relevant to this case was that the list was admitted only to the extent of its consistency with s 76 of the Companies Act. The subject of s 76 is "Standards of Directors' Conduct". The provisions relied upon by the plaintiff in its pleadings are contained in Section 76(2)(a)(i)&(ii), which for the purposes of the present dispute, are to the effect that a director of a company must not use the position of director to gain an advantage for the director, or knowingly to cause harm to the company. Those provisions are relied upon in conjunction with the common law position with regard to the fiduciary relationship between a director and a company.

[11] There are of course other provisions of s 76 which speak to the duties and conduct of directors, such as, for instance, ss 76(3)(a)&(b) which are to the effect that a director must perform his or her duties in good faith and for a proper purpose, and in the best interests of the company. In argument counsel for the defendant suggested that s 76 of the Companies Act is in effect a codification of a director's common law fiduciary duties. I was referred in this regard to paragraph [42] of the judgment in *Sanlam Capital Markets (Pty) Ltd v Mettle Manco (Pty) Ltd and others* [2014] 3 All SA 453 (GJ) as authority for that proposition. In my view the judgment is not to that effect. The observation made there is that the provisions of s 76(3) of the Companies Act reiterate material already part of the common law.

[12] I was not referred to any authority for the proposition that the provisions of the Companies Act as a whole should be regarded as having codified our law relating to the fiduciary relationship between directors and their companies, with the result that conduct not forbidden by the provisions of the Act is now sanctioned.

[13] During the course of argument after the evidence had been led I raised the question as to the relevance of s 75 of the Companies Act to the matter at hand. Neither counsel thought it necessary to address me on the topic, and when I furnish an account of the facts of this matter it may become apparent why. Be that as it may, the section sets out a series of steps which must be taken when it transpires that a director has a personal interest in a matter upon which the directors must make a decision. The section requires the affected director to disclose the interest and its general nature before the matter is considered at a meeting, and to disclose to the meeting any material information relating to the matter which is known to the director. He may disclose what are called "observations of pertinent insight" relating to the matter if requested to do so. But the director may take no part in the decision making process. Section 75 (7)

is then to the effect that a decision of the board, or a transaction or agreement approved by the board, will be valid despite any personal financial interest of the director only if it was approved following disclosure of that interest in the manner required by the section; or, when there was no such disclosure, if it is subsequently ratified by an ordinary resolution of shareholders following the disclosure of that interest; or if the court declares it valid. It seems to me that the section endorses the common law position, and perhaps carries it a little further by rendering formalities mandatory.

[14] It seems to me, therefore, that the legal principles upon which the plaintiff relies are well established. It follows that if the plaintiff has proved a breach of the fiduciary duties owed to it by the defendant in connection with the transaction, the plaintiff had the right to declare void the contract in terms of which it bought the shares, member's interests and loan accounts. If there was such a breach, then there was no validation as provided for in the Companies Act.

[15] I turn to the facts. In November 2009 Morgan Creek was fully involved in the Shortens development and things were not going well. On 27 November 2009 Mr Mark Johnson (who was called by the plaintiff) sent an email to his co-directors of Morgan Creek, including the defendant. It opened with the words "Guys – this is blunt and to the point. It is how I feel as well." He complained of not having slept the night before and blamed himself as "from day one at Shortens I realised it would run into problems for many reasons … . These have proven true." There are matters of detail in that email of which I cannot give a proper account as not everything in the email was discussed and explained in evidence. It suffices to say that the email painted a bleak picture of the state of the company. Without a very substantial investment of money (at that stage R4 million was needed in days, and another R8 million by the end of January 2010,

as well as further funding) the company was at risk. Mr Johnson's attitude is perhaps summarised by this paragraph in the email.

> "Despite us having R15m or so in equity on paper that means squat – There is no doubt in my mind that for what we owe, everything will be attached, auctioned and we will be very lucky if we do not come out owing more. Again we have to react now to prevent this."

[16] The defendant replied to this email opening his communication with the words "My turn not to sleep tonight". Again there are matters of detail which were not explained in evidence; and again there is nevertheless a paragraph in the email which summarises the defendant's attitude.

> "Being blunt, I put it to you that if our little group has a potential asset value of R30m, with R15m of debt, then maybe we should really be considering closing down and cutting it up between us now anyway, before it is too late. The main reason the company overheads are so dammed scary is because of the four director salaries and perks. The second harsh reality is that R5m of our debt has been caused by this when we have had no income since Clifton."

The reference to "Clifton" is a reference to an earlier development in which Morgan Creek had been involved.

[17] The defendant said in evidence that the cash flow problems which had come to the fore in November 2009 were the product of the entire project being some six months behind schedule. Morgan Creek had sold 32 units, but it was not yet possible to transfer them. (The transfers went through in March 2010.) The shells of a further twelve units were constructed but not yet sold, and the company had to find an investor to buy them.

[18] The defendant knew Mr Charles Salem. He knew him to be a director of a company known as Bay Area Investments and believed that some "higher level of trust" controlled that company. The defendant had developed a friendship with Mr Salem and put a proposal to him that what he called (in a

letter dated 23 April 2010) "your Mauritian trust, or agreed overseas vehicle" becomes the sole shareholder of a clean local shelf company which would appoint Mr Salem and the defendant as directors, and that this company would buy the twelve relatively near complete units for a price of approximately R9,6 million. This price apparently constituted a discount of some 17% on the price which Morgan Creek would have hoped to obtain for the units but for the severe market conditions which prevailed at the time. The idea was that Morgan Creek would complete the twelve units and that the defendant would take responsibility for securing tenants and administering the tenancy of them with a view to generating an income for the new company (and through it, for its principals). An agreement was reached along these lines and the company thus formed is the plaintiff. Listening to the defendant's evidence in chief I gained the impression that at this time he did not know that Mr Peall was the person whose financial interests were being serviced through Mr Salem in and from Mauritius. But later on in his evidence this was no longer clear. When summarising the evidence, counsel for the defendant suggested that it looks like payment for those twelve units was made in May 2010; and judging by the financial statements of the plaintiff for the year ending February 2011, that submission appears to be correct.

[19] Very much later, when Mr Peall and his employees were trying to unravel what had happened, the defendant wrote a letter to him dated 14 December 2011. In furnishing his overview of the transaction which saw the plaintiff buy twelve units in Shortens, the defendant said the following.

> "Towards the end of 2009, Charles and I discussed the fact that, after constructing several of the Shortens apartment buildings, we were going to have some excess stock."

What exactly was discussed at that time between Mr Salem and the defendant was not canvassed in evidence, presumably because the centre of this dispute is not this initial transaction, but the one relating to shares and loan accounts

which followed later. Be that as it may, on the evidence before me the need to sell the twelve units at Shortens arose because of the dire financial circumstances in which Morgan Creek found itself. The units were not "excess stock" i.e. stock in excess of the requirements of Morgan Creek. They were stock the company had to sell, even at a discount, in order to survive. Given that the main purpose of the letter of 14 December 2011 was to try and explain the share deal which has given rise to this litigation, it is perhaps unsurprising that the defendant found it necessary to obscure information concerning the state of Morgan Creek at the time when it sold the twelve units to the newly formed plaintiff.

[20] The sale of the defendant's family home (in the registered ownership of his wife) is the next event in the chronology. According to the defendant's evidence-in-chief at some stage prior to August 2010 Mr Salem asked to purchase the house saying that he had a corporate client who would take it up as residential accommodation. The defendant stated in chief that he had no idea of what sort of corporate client was involved. The defendant states that an agreement was prepared with annexures, and he identified a copy of it in his bundle of documents. (The copy did not include all the formal annexures.) It was drawn up, said the defendant, at a time when Mr Salem had not yet confirmed who would be the purchasing entity, as a result of which the copy in the bundle fails to disclose the identity of any purchaser. That copy is unsigned. The defendant says that his wife had signed the document and that it had been forwarded to Mr Salem. The defendant never ever saw a completed version of the document.

[21] The house was a section in a development known as Krantzkloof Falls Estate. The defendant described it as luxurious. The price of Australian $600 000 (said to be the equivalent of R4 020 000) was to be paid in one lump sum. The document is a remarkable one in some respects, and especially in one

particular respect. The conditions of sale recorded in clause 4.1 that the money would be paid and lodged with conveyancers to be held in trust and released to the seller on the date of registration of transfer. That provision emanated from the standard form used, apparently, in sales of property on that particular estate. Clause 5 in the standard form is designed to stipulate the place of payment. It was used by the defendant to provide, in conflict with clause 4.1, that payment would be made direct to the seller, and what is more, directly into an account held by the defendant and his wife at a bank in Australia. When cross-examined on this topic, with specific reference to the absence of the normal protections afforded to a purchaser pending transfer, the defendant stated that it had been discussed with Mr Salem that payment would be made in advance and that is what had been agreed. When pressed, the only explanation the defendant offered was that he needed the money to be paid in advance of transfer to show that the purchaser was serious. Most of the money was paid. A letter dated 2nd August 2010 was addressed to the defendant by his Australian bank reporting that a sum of Australian $540 832,88 had been received in his account. The remitting bank was in Mauritius, and the payment was made by order of Bay Area. (The legend identified the payment as *'Sale commission to Marcus Marchant ref 1st instalment of hse purchase on behalf of CSS'.* The defendant could not explain the legend.)

[22] The transfer of the house never took place. The defendant never saw a copy of the sale agreement which identified the buyer, and which was signed by the buyer. At the end of the defendant's evidence-in-chief one was left with the impression that the defendant might never have discovered who the intended purchaser was. But under cross-examination on this topic, in the course of protesting that he acted with integrity and honour with regard to this transaction, the defendant disclosed that at all times he had believed that Mr Salem was acting as Mr Peall's authorised representative.

[23] I should say something at this juncture about the quality of the defendant's evidence. He occupied the witness stand for an inordinately long time. This was mainly because he chose to furnish long and detailed answers to questions which did not concern the contentious issues, and which were designed merely to ensure that the factual issues of substance were broadly contextualised. The witness's generosity with respect to detail and background dissipated somewhat when it came to questions that mattered – questions going to his integrity and the performance of his duties as a director of the plaintiff. The detailed perspective the defendant furnished for events of little significance was largely absent when he dealt with matters of substantial significance to the outcome of the case. In the absence especially of Mr Salem the defendant's evidence is the only evidence on a number of issues, crucial and otherwise. The difficulty is that I find him an unsatisfactory witness, and in my view his evidence must be treated with caution. The transaction with respect to the defendant's family home is unsatisfactorily explained. His statement in cross-examination that at all times he believed that Mr Salem was acting on behalf of Mr Peall is supported by the fact that he did not claim to have been surprised by the fact that the origin of the very substantial deposit into his Australian bank account on 2nd August 2010 was Bay Area, a company he knew to be the financier and shareholder of the plaintiff. Given the relationship the defendant claimed to have had with Mr Salem, essentially one of trust well placed, it is difficult to understand why Mr Salem would initially not have conveyed the name of his principal, and why the defendant's evidence in chief was in conflict with his evidence under cross examination on the question as to whether the defendant was aware at all material times that he was dealing with Peall interests. The notion that the defendant required payment in advance of transfer as some sort of show of good faith is improbable and in conflict with his account of his relationship with Mr Salem. As an experienced estate agent the defendant would have had no difficulty understanding the proposition that the

price of immovable property is for good reason held in trust until transfer. In my view there had to be another reason why that basic rule was ignored in this case, one which remains obscured because of the witnesses who were called, only the defendant could furnish it.

[24] According to the defendant shortly after he had received the money in respect of the sale of his family home he was contacted by Mr Salem to say that the principals of Mr Salem had changed their minds and did not want the house. It was proposed that there should be another plan and Mr Salem put forward the idea of purchasing the defendant's shares in the various companies in which the defendant was involved. This was in August 2010, or perhaps in September. A written agreement eventuated, the first of three. The peculiar thing about the first document is that it reflected Mr Salem himself as the purchaser; this despite the fact that the transaction was one which was supposed to replace the sale of the defendant's family home, most of the price of which was already lodged in the defendant's bank account, having been paid by Bay Area. This first agreement (signed by the defendant and Mr Salem in November 2010) provided for a sale price of AUS $1,070,000. (The sale then included a separate loan account of the defendant in an amount of R1,5million owed to the defendant by Morgan Creek.)

[25] On a number of occasions in the course of his evidence the defendant mentioned that he believed Mr Salem was acting on trust for someone else in respect of this or the other transaction. But in his evidence he stated quite clearly that he owed no fiduciary duty to the buyer under the first agreement for the sale of his shares, which must carry with it the implication that he did not know in August/September, or in November 2010 when the agreement with Salem was signed, that Mr Salem was representing the plaintiff at that time. Nevertheless, there was no time when the defendant did not believe that the money paid by Bay Area in respect of the sale of his family home would not

stand as a payment on account of the price of the shares and loan accounts. But Bay Area's business to date in connection with Morgan Creek had been done through the plaintiff.

[26] The agreement of November 2010 between the defendant and Mr Salem had the same annexure C attached to it as the third agreement (between the plaintiff and the defendant) which is at the centre of this litigation. The clause which introduces the annexure reads as follows.

> "The purchaser accepts the financial positions of the respective companies and close corporation as set out in the summary spread sheet attached as annexure "C" hereto and dated 31 August 2010."

According to the defendant it was necessary for the purpose of that first agreement to provide Mr Salem with what the defendant called "due diligence information". The defendant says that this was more than financial information. It related also to the prospects of the companies and what his role and responsibilities were in the companies. But he provided no details of that save for a reference to two documents which revealed the relationships between the companies; and a summary of the five legal entities running into some six pages, two of which dealt with Morgan Creek. This document, he said, was given to Mr Salem. As far as Morgan Creek is concerned under the heading "current projects" the document refers to three other potential projects besides Shortens. Insofar as these three projects are concerned the defendant tendered no evidence that matters. They were not mentioned by Mr Mark Johnson in his evidence. If the references to those projects in the document were intended to illustrate value in a transaction for the purchaser of shares in Morgan Creek, then this was one of the areas of evidence which the defendant left quite obscure.

[27] What the defendant did say was that in about August or September he made all the audited financial statements for the legal entities available to Mr Salem. They were inspected at the defendant's office. The financial statements for the year ending February 2010 were not yet signed off. The financial statements for the year ending February 2009 were signed off, and these were the ones made available to Mr Salem. It was against that background that the document called annexure "C" was provided to Mr Salem. I will revert to its contents later.

[28] It was one of the terms of the agreement with Mr Salem that Reserve Bank approval be granted for payment of the purchase price, and this was turned down. According to the defendant this resulted in the plaintiff being substituted for Mr Salem as the purchaser of the defendant's interests in the group headed by Morgan Creek. Minor alterations were made to the agreement with Mr Salem, principally inserting the name of the plaintiff above Mr Salem's name so that the document reflected the purchase of the interests by the plaintiff represented by Mr Salem. The defendant said that this change was convenient because transactions requiring Reserve Bank approval had previously been achieved through or in connection with the plaintiff. He said that it was sensible to use the plaintiff as the purchaser.

[29] The basis upon which Mr Salem was the initial purchaser remained murky from beginning to end. The replacement of Mr Salem with the plaintiff as purchaser as a mere matter of "convenience" was not satisfactorily explained. Because this second agreement was merely an altered form of the first, and was not re-signed, the proclaimed date of signature (and conclusion) remained 22 November 2010. A loan agreement in terms of which Bay Area would lend the plaintiff the money required for the transaction was signed on behalf of the plaintiff by Mr Salem on 4 May 2011. The alteration of the agreement for the sale of shares and the loan accounts in the group appears to have taken place

shortly after that, but before mid-May 2011. By then the financial statements of Morgan Creek for the year ending February 2010 had been signed off. Notwithstanding that, and the passage of time since the first agreement was concluded, the defendant did not claim to have made any further disclosures to Mr Salem, now apparently representing the plaintiff, with regard to the transaction, despite the fact that he admitted that his fiduciary obligations were operative with regard to the transaction in May 2011.

[30] As is the custom with private companies, any shareholder wishing to dispose of the shares which the defendant was selling had to first offer them to the other existing shareholders at the same price. The defendant had made his offer to his co-shareholders following the first agreement concluded with Mr Salem. They declined the offer. Under cross-examination the defendant proffered the view that if he was the buyer of his own shares he would probably have paid not far short of what was in the sale agreement. Mr Mark Johnson's views, when he gave evidence, were quite different. His attitude was that he would have given away his shares if he could. (It appears that the shareholders' suretyships extended to some R20 million, a fact which was not disclosed in any of the three agreements which were concluded for the sale of the defendant's interests in the group; this despite the fact that in terms of each it was the duty of the incoming purchaser to stand surety in place of the defendant. I understood Mr Johnson to be implying that it was the difficulty of getting a newcomer to stand surety which would have been an obstacle to "giving away" the shares.) Of course neither of these observations purported to be an accurate or scientific valuation of the shareholder's interests which were being sold by the defendant at the time. Nevertheless, given the defendant's position as a director of the plaintiff, his own evidence is that the plaintiff was paying more for the shares than he would. That immediately raises the question as to why this was not pointed out to the plaintiff and explained.

[31] The change in the purchaser from Mr Salem to the plaintiff meant that the defendant had to approach his co-shareholders again. He did so on 16 May 2011 by email. He explained that the identity of the purchaser had been changed as a result of which a new certificate was required from his co-shareholders and directors. Mr Mark Johnson responded that he would prefer to sign a schedule recording his consent to the proposed sale without the prices which were set out in the form provided. He was unhappy to sign in that form because it conveyed that he accepted the values. He recorded that he was personally not in agreement with some although he accepted that the price being paid was none of his business. Mr Johnson mentioned that the remaining shareholders would have to "face the music if for example Shortens wobbles" as this is where the value in Morgan Creek lay. The defendant responded without asserting that he held the view that the prices mentioned in the proposed schedule represented true value to the purchasing plaintiff. He suggested that shareholders signing the schedule would not thereby be "accepting the values placed on the individual shares (and loan accounts) as being indicative of the values of the various companies". He added the following.

> "Please remember that David Hotz also issued a certificate stating that the purchase price was fair, market related and arm's length, so Peall therefore cannot come back later and complain about the price he paid for the shares."

The tone of this communication, and its content, convey (at best for the defendant) a distinct lack of concern on the defendant's part for the interests of the plaintiff.

[32] Mr David Hotz was a member of the auditors of the group. The certificate he signed was for Reserve Bank approval of the first transaction. He was not called. The certificate did not purport to be a valuation of the shares. Given that he is unable to defend himself I will go no further than to say that there was no reason for the court in this case to regard the certificate signed by

Mr Hotz as evidence of the true value of the shareholders' interests sold by the defendant to the plaintiff. The tone of the defendant's email of 16 May 2011 to Mr Johnson hardly suggests that either of them regarded the certificate issued by Mr Hotz as of any significance other than as a formal requirement in order to obtain Reserve Bank approval for a transaction involving foreign funding.

[33] In my view it is probable that the existing shareholders of the group of which Morgan Creek was the prominent feature knew at the time (May 2011) that the price being tendered by the plaintiff for the defendant's interests in the group was too high. Whatever the defendant may have believed regarding his duties of disclosure in November 2010 when an agreement was struck with Mr Salem as the apparent purchaser, the defendant now accepts that in May 2011 he owed a fiduciary duty to the plaintiff. In law he could not at the same time be a director of the plaintiff and fail to disclose to the plaintiff that in his (the defendant's) view the sale price was too high, and explain why he believed that to be the case. The fact that the defendant claims to have believed that the difference between price and value was not significant, whereas Mr Mark Johnson clearly thought it was, does not affect the application of the principle.

[34] Around the middle of May 2011 the defendant had to leave for the United Kingdom as his father's health was failing. He was contacted there by Mr Salem and advised that a problem had arisen because Mr Salem's principal wished to invest less. It was agreed that a particular loan account of R1,5million which the defendant held would be excluded from the sale, thereby reducing the sale price to Aus $850 000. The written agreement was on this occasion redrafted to reflect that, and signed in London in June 2011. It is the one ultimately implemented, and upon which this action turns. The signature page records that it was signed at Gillits, KwaZulu-Natal, on 15 July 2010. The defendant says that he is unable to explain why it was back-dated in that fashion. He says that he believes that it was probably because it suited the

plaintiff's accounting for the transaction (or the Peall accounting for the transaction), bearing in mind the monies that had been paid into the defendant's Australian bank account (according to the defendant, in respect of the sale of his house) during August 2010. But the agreement says nothing about such an advance payment; it was cast on the basis that the entire price was yet to be paid.

[35] I turn now to annexure C, which featured in each of the three agreements to which I have made reference above. It was one of a set of three documents or schedules produced by Mr James Johnson to serve before a meeting of the directors of Morgan Creek held on 29 September 2010. It purported, like the other documents apparently did, to reflect the position as at 31 August 2010. The defendant accepted in evidence that as far as it went annexure C was a statement of the group assets and liabilities. The other two documents or spread sheets prepared for the meeting were a document reflecting the profit position of Morgan Creek and a schedule which was apparently headed "Shortens work in progress valuation". The profit schedule was produced in evidence. The work in progress valuation was not.

[36] It will be recalled that the plaintiff had pleaded that annexure C reflects the net asset value of the companies as at 31 August 2010 as some R14,9 million, whereas the financial statements for 28 February 2010 (six months before) revealed a net asset value of about R600 000 in round figures. The defendant's answer to that was that work in progress was valued for the purposes of audited financial statements at the lesser of cost or value; whereas in annexure C work in progress was reflected at its value. The former documents reflect the basis of valuation of work in progress. Annexure C does not, although Mr Mark Johnson confirmed in evidence that annexure C reflected work in progress at "value"; which presumably means at an assessment of the contribution work already done would make to the ultimate sale prices of the

units to which it related. The defendant and Mark Johnson both stated that they had confidence in Mr James Johnson's work as the group accountant, but neither of them made it clear whose valuation was applied to work in progress for the purpose of internal accounts such as annexure C.

[37] The defendant's evidence did not disclose an attempt on his part properly to explain all this to Mr Salem. Upon the assumption that Mr Salem was genuinely looking after Peall interests and those of the plaintiff (when the plaintiff became the purchaser in his stead), it might have helped an understanding of annexure C (which, it must be remembered, had to be measured against the financial statements of February 2009, not 2010) if both the schedules of profit and of work in progress which were produced together with annexure C were disclosed in the same manner as annexure C. Annexure C records that Morgan Creek had retained earnings of more or less R10,5 million. The annual financial statements of the company for the year ending February 2009 reveal that, far from having retained earnings, it laboured under an accumulated loss of some R275 000. Anyone reading those two documents together would suppose that very considerable profits had been earned between 1 March 2009 and 31 August 2010, which was not the case.

[38] The defendant did not claim to have made any further disclosures or attempts at compliance with his fiduciary duties when, in May 2011, the plaintiff for the first time became the purchaser of his interests in his group. By then the annual financial statements of Morgan Creek for the year ending February 2010 had also been signed off. They revealed a worse accumulated loss, now at a level of just over R3 million.

[39] When cross-examined about the qualities of the final agreement, the defendant agreed that nothing in the document could properly be described as being in favour of the purchaser. When asked about whether he accepted that

he had different obligations when the plaintiff became the buyer of his interests in his group he claimed that the protection to the buyer was the provision of the financial snap shot which was annexure C, and that the buyer could accept it or not. None of this was consistent with the due and proper acknowledgement and performance of the defendant's obligations as a director of the plaintiff.

[40] That view is borne out by certain features of the meeting of the directors of Morgan Creek held on 29 September 2010 at which annexure C and the other schedules were presented. The minutes of the meeting reveal that there was no cash flow at the time. It was minuted, presumably because it was significant, that the August staff salaries had indeed been paid. But the directors were not being paid properly. Mr Mark Johnson said that his personal financial position had become difficult, and that he could earn far better elsewhere. Both the defendant and Mr James Johnson agreed that they were in similar difficult positions. The minute continues as follows.

> "It was agreed that all directors needed sufficient and regular salaries in order to concentrate on work and business".

It was agreed in the short to medium term to pursue cash flow rather than profit. In evidence the defendant agreed with the proposition that when a company is at risk as to whether it can pay its staff and directors one would normally say that the company was on the brink of being wound up. He accepted that a purchaser would have an interest in the fact that the company was at risk with regard to paying its staff and directors. These facts and circumstances are not apparent from annexure C. In my view the defendant was duty bound to make a full disclosure of them to the plaintiff. He was certainly not entitled to present annexure C as a "snap shot" of the financial position of Morgan Creek upon the basis that the plaintiff could take it or leave it.

[41] It will be recalled that in the email he wrote in November 2009 which opened with the words "my turn not to sleep tonight", the defendant had said that the main reason the company's overheads were "scary" was because of directors' salaries and perks. The profit schedule relating to Morgan Creek which was not disclosed to the plaintiff but which served before the directors' meeting in September 2010 records that over its history only R1 350 000 had been declared in dividends to shareholders. Against that, directors' salaries over the period are reflected as having been approximately R12,4 million. On the evidence before me this latter figure was somewhat conservative as there were certain benefits and perks put the way of the directors which would not ordinarily have featured in an accounting document under the heading "directors' salaries". Counsel for the plaintiff argues, correctly in my view, that all this information was of substantial significance, and had to be disclosed by the defendant to the plaintiff as a shareholder coming in merely as an investor. The plaintiff was buying a minority shareholder's interest. Putting aside the fact that when annexure C was produced the company was in a position where it was unable to even pay its directors properly, a disclosure of the historical ratio between directors' emoluments and other withdrawals, and dividends, would have illustrated that a minority shareholding in the company was hardly a sensible investment unless very substantial and certain future prospects by way of profits were in place. There is no evidence that such existed.

[42] In the circumstances I conclude that the plaintiff's claim that the defendant's act of annexing annexure C to the agreement was a breach of his fiduciary duty has been established. The plaintiff has established that the defendant advanced his own interests by making a profit at the plaintiff's expense and by failing to ensure that the financial information furnished in annexure C accurately reflected the position.

[43] The plaintiff is entitled to avoid the agreement and to repayment of the price of AUS $850 000 against the tender which the plaintiff has made.

[44] The "over-payment" of Aus $10 964,59 occurred when the balance of the purchase price of the defendant's interests in the group was paid by Bay Area on behalf of the plaintiff into the defendant's Australian bank account. The defendant offered no explanation for the error, which on his version should have been noted and corrected immediately. He remained a director of the plaintiff at that time. The defendant offered no explanation for the fact that neither of the two payments into his bank account coincided with the transaction to which it was said to relate.

[45] The plaintiff has claimed interest at the legal rate from date of demand. No particular date of demand in advance of service of the summons was proved. The defendant has offered no argument against an order of interest at the legal rate.

The following order is made.

Judgment is granted in favour of the plaintiff against the defendant for

(a) payment of the sum of Aus $850 000;

(b) payment of the sum of Aus $10 964,59;

(c) interest at the legal rate on the sums set out in (a) and (b) above from date of service of the summons to date of payment;

(d) costs of suit, including the costs of senior counsel.

DATE OF HEARING:	22 August 2014
DATE OF JUDGMENT:	30 October 2014
FOR THE APPLICANT:	L B Broster SC, instructed by WOODHEAD BIGBY & IRVING INC
FOR THE RESPONDENT:	R A Suhr, instructed by PRESTON-WHYTE & ASSOCIATES